

**United States Department of Labor
Employees' Compensation Appeals Board**

S.G., Appellant

and

**U.S. POSTAL SERVICE, BROADWAY
STATION, Astoria, NY, Employer**

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**Docket No. 21-0904
Issued: May 11, 2022**

Appearances:

James D. Muirhead, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge

JANICE B. ASKIN, Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 3, 2021 appellant, through counsel, filed a timely appeal from a January 4, 2021 merit decision and a March 29, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the March 29, 2021 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish a recurrence of disability commencing June 6, 2020 causally related to her accepted December 21, 2017 employment injury; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On December 21, 2017 appellant, then a 47-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on that day she fell and hit the back of her head, back, and wrist when she descended stairs and the last step crumbled, while in the performance of duty. She stopped work on that date. OWCP accepted the claim for concussion without loss of consciousness, cervical and lumbar strain, cervical and lumbar myofascial derangement, lumbar derangement with disc involvement, right elbow tear, and adjustment disorder with anxiety. It paid appellant wage-loss compensation for disability on the supplemental rolls from March 17 through November 10, 2018, on the periodic rolls from November 11, 2018 through December 7, 2019, and again on the supplemental rolls from December 8 through 13, 2019.

On June 11, 2019 appellant underwent OWCP-authorized procedures of C4-6 anterior cervical discectomy, fusion with allograft and instrumentation, and right iliac crest aspiration.

On September 3, 2019 OWCP referred appellant to Dr. Stanley Askin, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated September 27, 2019, Dr. Askin reviewed a statement of accepted facts (SOAF), conducted a physical examination and reviewed appellant's medical records. He determined that appellant's presentation was non-physiological in that she offered limitations that she clearly did not have and he stated that the only objective finding was that her cervical spine had been altered. Dr. Askin noted that appellant had fully recovered from her accepted work injury such that there was no work-related diagnosis, but that it was appropriate to await full healing from her unnecessary fusion procedure before concluding that her capacity to work unrestricted was restored. At that time he opined that she was currently capable of work at the sedentary level. In a work capacity evaluation (Form OWCP-5c) of even date, Dr. Askin found that appellant could return to work at a sedentary level with restrictions of no reaching above the shoulder, operating a motor vehicle at work no more than three hours per day, and operating a motor vehicle to and from work for no more than three hours per day.

On October 29, 2019 the employing establishment offered appellant a modified limited-duty assignment as a city carrier with physical requirements of sitting and use of a computer and telephone for six to eight hours per day and intermittent standing/walking and lifting of up to 10 pounds from one to two hours per day.

In a duty status report (Form CA-17) dated November 20, 2019, Dr. Steven Ross, an osteopath Board-certified physiatrist, indicated that appellant was totally disabled from work due to work-related diagnoses of cervical and lumbar myofascial derangement with cervical and lumbar disc herniations and disc bulges, bilateral wrist pain, left ankle pain, and a right elbow tear with post-traumatic headaches.

Appellant returned to full-time limited-duty work on December 14, 2019.

In a report dated May 21, 2020, Dr. Peter Passias, a Board-certified orthopedic surgeon, related that he had examined appellant for complaints of lumbar radiculopathy and lower back pain. On physical examination, he observed painful and reduced range of motion with tenderness to palpation. Dr. Passias diagnosed cervicalgia, low back pain, and thoracolumbar and cervical radiculopathy, and recommended that appellant undergo L2-S1 fusion and decompression.

On June 24, 2020 appellant filed a claim for compensation (Form CA-7) for leave without pay (LWOP) claiming disability from June 6 through 19, 2020. He continued to file CA-7 forms for LWOP.

In a development letter dated June 30, 2020, OWCP advised appellant that she should provide additional medical evidence to establish disability from work for the claimed period, noting that she had previously resumed full-time limited-duty employment on December 16, 2019, and thus it was unclear why she had stopped work. It afforded her 30 days to submit the necessary information.

In a Form CA-17 dated June 23, 2020, Dr. Ross indicated that appellant remained totally disabled from work due to her work-related diagnoses.

In a Form CA-17 dated July 8, 2020, Dr. Passias advised that appellant was not advised to return to work. However, he also noted appellant's medical restrictions including sitting and walking no more than four hours per day; simple grasping, fine manipulation, and reaching above the shoulder no more than two hours per day, and driving a vehicle no more than one hour per day. In an attached letter of even date, Dr. Passias explained that appellant suffered from significant lumbar spine pathology as a result of her work-related injury on December 21, 2017. He noted that diagnostic findings demonstrated multiple disc herniations from L2-L5 and physical examination demonstrated weakness into her bilateral lower extremities, left more than right, and diminished sensation throughout the lower extremities. Dr. Passias recommended spinal fusion surgery and stated that appellant was currently unable to return to work as she was 100 percent temporarily totally disabled from gainful employment.

In a development letter dated July 8, 2020, OWCP advised appellant that additional medical evidence was necessary to establish continued disability from work subsequent to June 20, 2020, noting it had not received any evidence to support the claim. It requested that she provide a complete and comprehensive narrative medical report, including a history of her injury and a thorough examination with objective findings, as to how her condition worsened such that she was unable to perform duties of her position after returning to limited-duty work on December 16, 2019 and stopping work on June 6, 2020. OWCP afforded appellant 30 days to submit the necessary information.

In a note dated May 29, 2020, Dr. Ross stated that appellant presented on that date with increased pain as a result of her work-related activities. Appellant recounted to Dr. Ross that she had to perform work activities going beyond those stated in her duty status report, and that these increased activities had caused increased pain. Dr. Ross advised that he had taken appellant off work to allow time to heal and decrease further risk of injury.

In a report dated June 23, 2020, Dr. Ross examined appellant and diagnosed cervical and lumbar myofascial derangement with cervical disc herniations and disc bulges post-anterior cervical discectomy and fusion (ACDF) on June 11, 2019; and lumbar disc herniations, disc bulge

with lumbar radiculopathy, bilateral wrist pain, left ankle pain, and right elbow tear with post-traumatic headaches. He advised that she remained temporarily totally disabled.

In a report dated June 23, 2020, Dr. Joel King, a Board-certified psychiatrist, evaluated appellant for diagnoses of depressive disorder and anxiety disorder. He reviewed her history of injury, noting that after returning to light-duty work in June 2019, she continued working despite significant pain until May 29, 2020, when her back pain became too severe to continue working. Appellant reported symptoms of anxiety and depression. On psychiatric examination, Dr. King observed a dysphoric and anxious mood.

In a report dated July 8, 2020, Dr. Passias advised that appellant was post cervical fusion surgery which had been performed in 2019, however magnetic resonance imaging (MRI) scans and x-rays revealed multiple disc herniations from L2-L5. He also noted that appellant's physical examination revealed weakness in her bilateral lower extremities and diminished sensation. Dr. Passias recommended that appellant undergo lumbar fusion and he related that appellant was totally temporarily disabled from employment.

On July 14, 2020 OWCP referred appellant to Dr. Askin for a second opinion examination as to authorization for a surgical procedure of spinal fusion and as to whether she had ongoing residuals due to injuries sustained on December 21, 2017.

By decision dated August 11, 2020, OWCP denied appellant's claim for compensation for disability from work for the period June 6 through 19, 2020, finding that she had not established disability from work for that period causally related to the accepted December 21, 2017 employment injury.

On August 13, 2020 OWCP received a report dated August 7, 2020, from Dr. Askin. Dr. Askin reviewed a SOAF, conducted a physical examination and reviewed appellant's medical records. He determined that appellant no longer had objective findings related to her accepted physiological conditions and that they had resolved. Dr. Askin noted that MRI scans of appellant's lumbar spine demonstrated age-appropriate degenerative changes. He opined that she was capable of returning to her date-of-injury position as a city carrier. In an attached Form OWCP-5c, Dr. Askin indicated that maximum medical improvement had been reached and that she was capable of performing her usual job without restriction. He further opined that authorization for additional surgical procedures involving lumbar spinal fusion were not necessary and would be medically negligent if performed.

By decision dated August 13, 2020, OWCP denied appellant's claim for compensation for disability from work for the period June 20, 2020 and continuing, finding that she had not established disability from work for that period causally related to the accepted December 21, 2017 employment injury. In a separate decision of even date, it denied medical authorization for the requested lumbar spinal fusion procedure, finding that it was not medically necessary to address the effects of her work-related condition.

On August 18, 2020 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review regarding the August 13, 2020 decision denying authorization for lumbar fusion surgery.

In a report dated August 18, 2020, Dr. King examined appellant for depressive disorder and anxiety disorder. He noted that appellant's mood was dysphoric and anxious during their session. Dr. King opined that her current psychiatric symptoms were causally related to her accepted work-related injury and that she was totally disabled on the basis of psychiatric illness. He continued to opine that appellant was totally disabled on the basis of psychiatric illness in reports dated September 8 and October 7, 2020.

In a report dated August 19, 2020, Dr. Ross examined appellant for complaints of pain in the low back, bilateral wrists, left ankle, right elbow, and neck, as well as post-traumatic headaches. He noted that she was currently out of work due to her injuries and that she was temporarily totally disabled. On physical examination of the cervical and lumbar spine, bilateral wrists, right elbow, and left ankle, Dr. Ross observed painful and reduced range of motion. He continued to opine that appellant was temporarily totally disabled in a report dated October 14, 2020.

In a letter dated September 9, 2020, Dr. Passias noted that she was under his care for her spine as a result of a work-related injury on December 21, 2017. He noted that she continued to suffer from worsening lumbar spine symptoms and left lower extremity paraesthesia, and that upon physical examination, he observed significant range of motion limitations of the lumbar spine and bilateral lower extremity weakness. Dr. Passias explained that based upon appellant's physical examination, objective findings, and diagnostic imaging, it was medically necessary that appellant proceed with lumbar spinal fusion surgery. He explained that without this procedure, he expected her condition to worsen and that she would suffer permanent disability.

The telephonic hearing before a representative of OWCP's Branch of Hearings and Review was held on October 27, 2020.

On December 4, 2020 appellant, through counsel, requested reconsideration of the decisions dated August 11 and 13, 2020, which denied her claim for wage-loss compensation. Attached to the request was a statement from appellant that her job duties had been changed and that she was required to exceed her work restrictions for the limited-duty position she was supposed to perform.

By decision dated December 17, 2020, the hearing representative vacated the August 13, 2020 decision denying authorization for a lumbar spinal fusion procedure. It found that there remained an unresolved conflict of medical opinion between Dr. Askin and Dr. Passias regarding whether appellant's requested lumbar spinal fusion surgery was medically warranted and causally related to her accepted claim. The hearing representative remanded the case file to an impartial medical examiner (IME) to resolve the outstanding conflict in medical opinion, to be followed by a *de novo* decision.

In questions to the IME dated December 21, 2020, OWCP requested that the physician opine as to whether appellant's work-related conditions had resolved, whether appellant was capable of returning to her date-of-injury position, and, if she was unable to return to her date-of-injury position, whether work restrictions were medically warranted. It also requested that the IME complete an attached Form OWCP-5c.

By decision dated January 4, 2021, OWCP reviewed the merits of its August 11 and 13, 2020 decisions and denied modification. It explained that appellant had not submitted medical

reports containing a well-rationalized opinion from a qualified physician explaining how her condition worsened such that she could no longer continue working in a restricted-duty capacity beginning June 6, 2020.

On January 20, 2021 appellant, through counsel, requested reconsideration of the January 4, 2021 decision. Counsel argued that her period of disability claim came about as a result of withdrawal of a light-duty assignment made specifically to accommodate appellant's condition due to her accepted work-related injury.

In a letter dated January 29, 2021, a supervisor at the employing establishment disputed appellant's claim that she was required to perform tasks outside her limited-duty medical restrictions. The employing establishment submitted additional statements dated January 29 and February 1, 2021 from supervisors stating that appellant was not required to perform tasks outside her limited-duty medical restrictions.

In a report dated February 3, 2021, Dr. Ross examined appellant for complaints of pain in the low back, bilateral wrists, left ankle, right elbow, and neck, as well as post-traumatic headaches. He noted that she was currently out of work due to her injuries and that she was temporarily totally disabled. On physical examination of the cervical and lumbar spine, bilateral wrists, right elbow, and left ankle, Dr. Ross observed painful and reduced range of motion. He diagnosed cervical and lumbar myofascial derangement with cervical disc herniations and disc bulges post-anterior cervical discectomy and fusion (ACDF) on June 11, 2019; and lumbar disc herniations, disc bulge with lumbar radiculopathy, bilateral wrist pain, left ankle pain, and right elbow tear with post-traumatic headaches.

In a report dated February 16, 2021, Dr. King examined appellant and observed that her mood was mild-to-moderately dysphoric and anxious, exacerbated by pain. He diagnosed depressive disorder with a major depressive-like episode and anxiety disorder due to another medical condition. Dr. King opined that her current psychiatric symptoms were causally related to her accepted work-related injury and that she was totally disabled on the basis of psychiatric illness.

By decision dated March 29, 2021, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which resulted from a previous compensable injury or illness and without an intervening injury or new exposure in the work environment.⁴

When an employee who is disabled from the job he or she held when injured on account of employment-related residuals returns to a limited-duty position, or the medical evidence of record establishes that he or she can perform the limited-duty position, the employee has the burden of proof to establish by the weight of the reliable, probative, and substantial evidence a recurrence

⁴ 20 C.F.R. § 10.5(x); A.V., Docket No. 20-0486 (issued June 20, 2021); J.D., Docket No. 18-1533 (issued February 27, 2019).

of total disability and to show that he or she cannot perform such limited-duty work.⁵ As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements.⁶

The medical evidence required to establish causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the claimed disability and the accepted employment injury.⁷ The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify his or her disability and entitlement to compensation.⁸

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for decision.

OWCP found that a conflict in the medical opinion evidence existed between appellant's treating physician Dr. Passias, and OWCP's second opinion physician Dr. Askin, as to whether appellant required authorization for further surgical treatment of her lumbar spine. While OWCP had not determined that a conflict existed regarding appellant's ability to work after June 6, 2020, in questions to the IME dated December 21, 2020, OWCP also requested that the physician opine as to whether appellant's work-related conditions had resolved, whether appellant was capable of returning to her date-of-injury position, and, if she was unable to return to her date-of-injury position, whether work restrictions were medically warranted. It also requested that the IME complete an attached Form OWCP-5c. However, OWCP did not receive the completed IME report and Form OWCP-5c, containing answers to these questions regarding appellant's work status, prior to issuance of its January 4 or March 29, 2021 decision on reconsideration.

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence to see that justice is done.⁹ Once it undertakes development of the record, it must do a complete job in

⁵ See *D.W.*, Docket No. 19-1584 (issued July 9, 2020); *S.D.*, Docket No. 19-0955 (issued February 3, 2020); *Terry Hedman*, 38 ECAB 222 (1986).

⁶ *Id.*

⁷ *R.C.*, Docket No. 20-1637 (issued September 24, 2021); *Y.S.*, Docket No. 19-1572 (issued March 12, 2020).

⁸ *J.B.*, Docket No. 19-0715 (issued September 12, 2019); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁹ *L.F.*, Docket No. 20-0459 (issued January 27, 2021); *J.R.*, Docket No. 19-1321 (issued February 7, 2020); *S.S.*, Docket No. 18-0397 (issued January 15, 2019).

procuring medical evidence that will resolve the relevant issues in the case.¹⁰ Accordingly, the Board finds that the case must be remanded to OWCP.¹¹

On remand, OWCP shall conduct a complete merit review of the medical evidence of record, including any report of record containing answers to the questions posed on December 21, 2020 regarding appellant's work status beginning June 6, 2020. It shall then determine whether an unresolved conflict of medical opinion exists regarding appellant's ability to work and any work limitations relative to her accepted physiological and psychiatric conditions. After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.¹²

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the January 4 and March 29, 2021 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 11, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁰ *Id.*; see also *R.M.*, Docket No. 16-0147 (issued June 17, 2016).

¹¹ *J.R.*, *supra* note 9; *J.T.*, Docket No. 18-1300 (issued March 22, 2019).

¹² In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.